MINERALS COUNCIL OF AUSTRALIA

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM

(AM2024/6)

VARIATION OF DELEGATES RIGHTS TERMS IN MODERN AWARDS

(AM2025/28)

SUBMISSIONS

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TABLE OF CONTENTS

1. Introduction and general principles 3
2. Response to proposed award terms 4
3. Comments on the Mining and Energy Union's proposed delegates' rights term 6
Attachment – Commission Draft Award Term with proposed MCA amendments 10

1. INTRODUCTION AND GENERAL PRINCIPLES

1. This is the submission of the Minerals Council of Australia (the '**MCA**') in response to the Statement and Direction issued by a Full Bench of the Commission on 23 December 2025, requesting submissions in these matters by 4:00pm on 16 January 2026 (the '**Statement and Direction**').[1]

2. The Statement and Direction was issued in response to the decision and orders made by a Full Court of the Federal Court on 17 December 2025, which quashed variations to modern awards made by the Commission in June 2024 (the '**2024 award terms'**) on the basis of several jurisdictional errors, and ordered the Commission to make new variations to such terms in accordance with the Court's ruling.[2]

3. The Court's decision ruled that the 2024 award terms contained three jurisdictional errors which now require amendment:

   (i) The terms limited union delegates to representing only employees of the same employer as the delegate, rather than all employees in the 'enterprise', which may include other employers;

   (ii) The terms restricted delegates to communicating with workers for the purpose of 'representing' their industrial instruments, rather than communication about such interests more broadly;

   (iii) The terms imposed restrictions on the exercise of delegates powers which required them to, inter alia, '*comply with their duties and obligations'* as employees; and not '*hinder, obstruct or prevent the normal performance of work'* whilst exercising such powers.[3]

4. The Statement and Direction indicated that the Full Bench will now expeditiously vary the relevant award terms in order to achieve compliance with the Court's ruling.

5. Whilst the MCA considered the 2024 award terms to be a balanced and reasonable outcome and is deeply concerned at the likely implications of the Court's decision, it accepts that the Full Bench proposes to now act in accordance with the Court's orders and amend the award terms to the extent required.

6. The MCA respectfully submits that the Full Bench now tasked with varying the award terms should approach this task in accordance with the following principles.

   a. *First*, the Full Bench should make only those variations that are strictly necessary to achieve compliance with the Court's orders. The 2024 award terms reflected the considered views of the Commission, which had struck a fair and workable balance in the creation of new union delegates powers. The 2024 award terms included checks and balances on those powers that gave due consideration to the detailed submissions and evidence provided by various employer parties.

   b. *Second*, the Full Bench proceeding to vary award terms should not be used as an opportunity by either union or employer parties to re-litigate claims that were put forward in the 2024 award terms proceeding but not accepted by the Commission.

   c. *Finally*, the proposed award variations should retain, to the full extent possible, those checks and balances on union delegates' powers that were contained in the 2024 award terms, as any such limits are clearly necessary to prevent the abuse of such powers.

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[1] *Variation of delegates' rights term in modern awards* [2025] FWCFB 293 (Statement and Directions, 23 December 2025).
[2] *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187.
[3] Ibid, [2]-[7].

2. RESPONSE TO PROPOSED AWARD TERMS

7. The Statement and Direction set out the provisional view of the Full Bench that the 2024 award terms be varied in accordance with new model terms included as Attachment C to the Statement and Direction (the **'draft term'**).

8. The draft term reflects the MCA's submission, outlined above, that the Full Bench should only vary the 2024 award terms to the extent necessary to achieve compliance with the Court's orders. The MCA respectfully endorses this general approach, subject to the following submissions on specific elements of the draft term. Given that the amendments in the draft term accord with the MCA's suggested approach and are mostly, in our view, uncontroversial, our submissions are made on an 'exceptions' basis and are limited only to those elements of the draft term where the MCA suggests a different approach to that which has been expressed by the Full Bench.

The need for 'reasonableness' in limiting union delegates' powers

9. The MCA endorses the provisional view expressed by the Full Bench in the Statement and Direction that the proposed award terms include the following obligations on union delegates, which would apply to their employment 'other than in relation to' the reasonable exercise of the powers under the proposed term:[4]

    (i) Comply with their duties and obligations as an employee; and

    (ii) Not hinder, obstruct or prevent the normal performance of work.

10. Whilst such terms are appropriate, they still create a very significant 'loophole' in that they would allow for union delegates to act in breach of their duties and obligations whilst exercising their powers as union delegates and would also allow them to hinder, obstruct or prevent the performance of work whilst exercising such powers.

11. In other words, the Court has determined that the Parliament did intend for union delegates to be given powers to *'hinder, obstruct and prevent'* the performance of work.

12. Whilst the 'loophole' created by the Court's decision is extremely regrettable and raises grave concerns regarding the potential for union delegates to disrupt work in mining industry workplaces, it reflects the Court's view that such an outcome is required under its interpretation of the legislation. The Full Bench, regrettably, must operate within these parameters.

13. Within these regrettable parameters, the MCA respectfully submits that the Full Bench should use this opportunity to impose whatever reasonable limits it can on the exercise of union delegates powers to prevent them from being used to *'hinder, obstruct or prevent'* the normal performance of work.

14. The proposed draft outlined above goes some way to achieving this goal but should go further. The MCA therefore respectfully submits that the draft wording be further amended to make it clear that in 'reasonably' exercising their powers, workplace delegates must do so in a way that avoids any unnecessary disruption to the workplace and is consistent with their duties as employees, to the extent that is now possible given the Court's decision.

15. To achieve this objective, the MCA submits that the proposed clause XX.9(b) in the Commission's draft term be amended to the following form of words:

[4] Attachment – MCA proposed clause XX.9(b)

(b) Workplace delegates must exercise their rights in a reasonable manner. In doing so, unless it is necessary to the exercise of their rights, they must:

(i) comply with their duties and obligations as an employee; and

(ii) not hinder, obstruct or prevent the normal performance of work.

Submissions on retrospectivity

16. The MCA notes the proposal in the Statement and Direction that the draft term be expressed to apply from 1 July 2024. This approach is not supported. Any industrial instrument that purports to impose new legal rights and obligations should only operate prospectively, unless there are clearly exceptional circumstances to justify and retrospective obligations. No such circumstances exist in this case.

17. As the proposed draft term would impose additional rights and obligations to those that have previously been in existence, it is inappropriate to make the variations retrospectively. Doing so could expose parties to liabilities for breaches of provisions which they had no knowledge of at the time of their actions. This is a fundamental principle, and such a consequence should be strictly avoided.

18. A further reason to oppose retrospectivity is the impact on agreement terms that have been approved by the Commission since 1 July 2024. By operation of s205A, the impact of such a course would be to also extend to parties to enterprise agreements approved by the FWC since 1 July 2024. This extends the reach of imposing retrospective obligations on parties who had no knowledge of those obligations at the time.

19. Further, as the Commission did not insert a valid delegates' rights clause by 30 June 2024, clause 95(3) of Schedule 1 has no application and does not require any new clause to apply from 1 July 2024. At the least, there is uncertainty as to whether the commission could, at this stage, validly rely on either s 160 or clause 95(3) to vary the awards as proposed.

20. On any view, the Commission cannot be satisfied that retrospectivity is justified because of exceptional circumstances.

3. COMMENTS ON THE MINING AND ENERGY UNION'S PROPOSED DELEGATES' RIGHTS TERM

21. As outlined above, the MCA respectfully submits that the Full Bench make only those variations to the 2024 award terms that are strictly necessary in light of the Court's orders and that the current proceeding not be used by union parties to re-litigate claims that were rejected by the Commission in the 2024 award terms proceeding.

22. However, should the Full Bench not adopt this approach and decide to consider any such claims by union parties, the MCA makes the following submissions in response to various claims put forward by the Mining and Energy Union in the 2024 award terms proceeding. The comments set out below are re-produced from the MCA's submission to that proceeding and, we submit, are equally relevant in the current proceeding should such union claims be considered.

Proposed right to represent union members and prospective members would subordinate employment duties to union activities

23. The proposed term provides that a workplace delegate is entitled to represent their union, union members and persons eligible to be union members on paid time during normal working hours.[5] The term is supplemented by an expansive 'right to reasonable communications' that authorises the delegate to communicate to any employee at any time about anything, not just workplace matters.[6]

24. The types of representation that would be legally protected would not be confined to 'industrial interests' but would, on the framing of the term, extend to representation on any matter. Such an approach would create a 'loophole' whereby a workplace delegate could claim to be representing someone in the workplace and be legally protected from the consequences of failing to perform their ordinary work duties. It opens the possibility of abuse through collusion, for example with other union members, to claim that 'representation' is being provided between union members in relation to non-workplace matters.

25. Such an approach would create an outcome where a workplace delegate could essentially devote all their paid time towards undertaking tasks that can be described as 'representation', avoiding their work duties. As such, the proposed term effectively turns workplace delegates into full-time union workers, who may perform work exclusively for the union, but who are on the payroll of the employer.

26. Clearly, such an approach fails to meet the test of reasonableness under section 350C.

Proposed right to be provided with information would be open to abuse

27. The proposed term would create a right for a workplace delegate to be provided with 'information relevant to their right to represent', with immunity from any confidentiality obligations.[7] Under the proposed term, the right to represent encompasses not just the representation of employees of the business, but of the union on any matter. The delegate would also have an unfettered power to then pass on such information to the union.[8]

28. This proposed term is so broad that it would, for example, allow a workplace delegate to request from an employer the personal contact details and home address of every union and non-union employee of the employer, for the purpose of allowing the union to contact those employees in pursuit of a political campaign the union is pursuing. The employer would be forced to comply with

[5] MEU Delegates' rights – Award Clause, clause 2.1, 2.4.
[6] Ibid., clause 4.
[7] Ibid., clause 2.2(a).
[8] Ibid., clause 8(a)(i).

the term, overriding employee consent, and any protections afforded by contracts of employment, company policies or the *Privacy Act 1988*. Employees' information could then make its way into a permanent database managed by the union, with immunity from breaches of confidentiality obligations extending to any subsequent use of that information.

29. Clearly, this approach must be rejected, as it does not meet the test of reasonableness. Any information required to be provided by an employee to a union must be subject to employee consent and expressly subject to obligations provided by the *Privacy Act 1988*. It should not be permissible for personal employee information to be provided to a union without each employee's informed consent, or for purposes that the individual does not agree to.

Proposed preferential access to working arrangements would create disharmony and is unfair

30. The proposed term envisages preferential access to shifts, rosters, or flexible work arrangements for workplace delegates, as follows:

    d. access to a particular shift, roster or other flexible work changes where necessary to facilitate the exercise of their right to represent during work time;

    e. be released from normal duties for the purpose of the workplace delegate participating in bona fide union business;[9]

31. In the way the proposed term is constructed, this would apply to representation of the union and the conduct of union business that may have no relationship to the workplace. This term would allow a workplace delegate to override rostering decisions made by management to accommodate any number of activities that fall within the ambit of 'representation'. A union delegate could, in effect, choose to work or not work at any time they choose, yet still be paid. The employer would have no power to refuse.

32. Such an approach would be disruptive to workplaces on multiple levels. First, it creates workplace disharmony because it establishes workplace delegates as a privileged class of employee with special access to shifts of their choosing, where non-delegate employees do not have this right. Second, it could directly disrupt operations, given there is no requirement to give notice when electing shifts. Clearly, this approach must be rejected as not reasonable.

Proposed allowance for paid leave for training is not reasonable

33. The proposed term creates an obligation to provide a *minimum* of 5 days paid training leave to attend training courses approved by the delegate's union, agreed in writing. Such leave can be taken with four weeks' notice.

34. There is no justification for a minimum number of paid training leave days per year to be provided for in Awards. Indeed, in many cases it may not be reasonable to provide a delegate with any training leave in a particular year – for example if they are an experienced delegate who has a thorough understanding of their role.

35. Even if the Commission does decide to provide a minimum amount of paid training leave, five days would be excessive. It is not commensurate to other professionalised industries such as law and accounting, which generally only require 10 professional development points (10 hours) per year to retain professional qualifications necessary to perform the inherent requirements of the role.

36. The proposed term also takes no account of the possibility that the operational needs of the business may outweigh the need for training. For example, if a mining operation has been subjected to a serious weather event that threatens production, or a pandemic, it could become

[9] Ibid., clause 2.2(d)-(e).

critical to have key personnel on site. It should be open to an employer to refuse paid training leave in such circumstances and the delegates' rights term should reflect this.

Proposed restrictions on employers communicating with their employees are not reasonable

37. Under the proposed term, an employer would not be lawfully allowed to deal directly with any worker who is being 'represented' by the workplace delegate without the agreement of the workplace delegate.[10] This would create an effective veto on the ability of managers to talk to their staff. Workers would also be prevented from talking directly to their employers unless they have had a *'prior opportunity to consult the delegate'*.

38. Such an approach would invite workplace dysfunction and conflict. It would lead to scenarios where, for example, the employer could not communicate with an employee on routine workplace matters, such as performance or safety issues – for example if the relevant delegate was not available due to their attendance at a union conference, or was working on a different shift.

39. Under the proposed term, employers would also be powerless to respond to abuses of union delegates powers, or even determine if the powers are being abused. It would be illegal for an employer to monitor (even inadvertently) any 'communication', or even ask whether it is appropriate:

> *6) An employer must not knowingly or recklessly survey, monitor, record or otherwise infringe the privacy of communications between workplace delegates and their union, union members or persons eligible to be union members.*
>
> *7) An employer must not:*
>
> *a) prevent workers from disclosing information to a workplace delegate or union; or*
>
> *b) require a worker to disclose the contents of any communications with a workplace delegate or union.*
>
> *Any term of an arrangement or contract which provides to the contrary is void and unenforceable.*[11]

40. Such outcomes demonstrate that the proposed term is does not meet the test of reasonableness.

Proposed requirement to consult on management decisions is unworkable and unreasonable

41. The proposed term includes a requirement to consult with workplace delegates whenever an employer is 'considering' changes of an economic, technological, or structural nature that may significantly impact employees.

42. The effect of this provision is that workplace delegates would by law have to be involved in all significant decisions of a company board or company management and would need to be provided with all relevant information, including commercially sensitive or confidential information – with no corresponding requirement to maintain confidentiality.

43. Clearly, this approach must be rejected on the basis it does not meet the test of reasonableness. It also sits at odds with the model consultation term, which only requires consultation with employees and their representatives, which would include delegates, where a 'definite decision' to introduce a major change has been made.[12] There is no case to depart from the model term, which reflects a settled legislative position that in turn reflects the outcome of test cases that have been accepted for many years.

[10] Ibid., clause 2.6(c).
[11] Ibid., clause 4(6)-(7).
[12] *Fair Work Regulations 2009*, schedule 2.3, r. 2.09.

Proposed access to facilities is excessive and unreasonable

44. The proposed term includes an unfettered right to workplace delegates to access to *'make use of the facilities and equipment where the enterprise is being carried on'*.[13]

45. Access to 'facilities' can include any facility or location in any workplace. It includes no restriction on the type of 'facility' or the nature of the 'access'. This is not reasonable. It could, for example, entitle a delegate to demand flights and accommodation to a remote mine site, at the employer's expense. Once at the mine site it could, for example, entitle the delegate to demand access to all facilities, such as draglines within an open cut mine, or underground 'facilities' deep within a mine, at any time and without regard the cost implications or safety risks.

Proposed entitlement to be 'released from normal duties' for union business

46. The proposed term includes an entitlement to be released from normal duties for '*bona fide union business'* even where this has no relationship to the employee's employment.[14] This includes collective bargaining meetings, 'any consultative process', travel, union meetings and events, and political lobbying.

47. The term is so broad it would effectively operate as an open right for union delegates to take leave at any time, or to simply decline to undertake their usual work tasks, for almost any reason. Since the proposed term also includes a broad prohibition on employers requiring a workplace delegate to disclose *'information to it, or make any use of such information'* it would in any case be impossible for an employer to verify if the request was for *'bona fide union business'*.[15]

48. Clearly, such a term does not meet the test of reasonableness and would upend the principle that a workplace delegate is first and foremost an employee.

[13] MEU Delegates' rights – Award Clause, clause 5(1).
[14] Ibid., clause 2.3.
[15] Ibid., clause 4(8).

ATTACHMENT – COMMISSION DRAFT AWARD TERM WITH PROPOSED MCA AMENDMENTS

Note:

- Shading indicates where drafting in the Statement and Direction of 23 December 2025 differs from the existing standard award delegates' right clause.
- Marked up text represents the MCA's proposed amendments, where these depart from the drafting in the Statement and Direction

XX. Workplace delegates' rights

XX.1 Clause XX provides for the exercise of the rights of workplace delegates set out in section 350C of the Act.

NOTE: Under section 350C(4) of the Act, the employer is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause XX.

XX.2 In clause XX:

(a) employer means the employer of the workplace delegate;

(b) delegate's organisation means the employee organisation in accordance with the rules of which the workplace delegate was appointed or elected;

(c) eligible workers means members and persons eligible to be members of the workplace delegate's organisation who work in a particular enterprise;

(d) workplace delegate means a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.

XX.3 Before exercising entitlements under clause XX, a workplace delegate must give the employer written notice of their appointment or election as a workplace delegate. If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election.

XX.4 An employee who ceases to be a workplace delegate must give written notice to the employer within 14 days.

XX.5 Right of representation

A workplace delegate may represent the industrial interests of eligible workers who wish to be represented by the workplace delegate in matters including:

(a) consultation about major workplace change;

(b) consultation about changes to rosters or hours of work;

(c) resolution of disputes;

(d) disciplinary processes;

(e) enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate's organisation with enterprise bargaining; and

(f) any process or procedure within an award, enterprise agreement or policy of the employer under which eligible workers are entitled to be represented and which concerns their industrial interests.

XX.6 Entitlement to reasonable communication

(a) A workplace delegate may communicate with eligible workers in relation to their industrial interests under clause XX.5. This includes discussing membership of the delegate's organisation and representation with eligible workers.

(b) A workplace delegate may communicate with eligible workers during working hours or work breaks, or before or after work.

XX.7 Entitlement to reasonable access to the workplace and workplace facilities

(a) The employer must provide a workplace delegate with access to or use of the following workplace facilities:

(i) a room or area to hold discussions that is fit for purpose, private and accessible by the workplace delegate and eligible workers;

(ii) a physical or electronic noticeboard;

(iii) electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible workers and by eligible workers to communicate with each other, including access to Wi-Fi;

(iv) a lockable filing cabinet or other secure document storage area; and

(v) office facilities and equipment including printers, scanners and photocopiers.

(b) The employer is not required to provide access to or use of a workplace facility under clause XX.7(a) if:

(i) the workplace does not have the facility;

(ii) due to operational requirements, it is impractical to provide access to or use of the facility at the time or in the manner it is sought; or

(iii) the employer does not have access to the facility at the enterprise and is unable to obtain access after taking reasonable steps.

XX.8 Entitlement to reasonable access to training

Unless the employer is a small business employer, the employer must provide a workplace delegate with access to up to 5 days of paid time during normal working hours for initial training and at least one day each subsequent year, to attend training related to representation of the industrial interests of eligible workers, subject to the following conditions:

(a) In each year commencing 1 July, the employer is not required to provide access to paid time for training to more than one workplace delegate per 50 eligible workers.

(b) The number of eligible workers will be determined on the day a delegate requests paid time to attend training, as the number of eligible workers who are:

(i) full-time or part-time employees; or

(ii) regular casual employees.

(c) Payment for a day of paid time during normal working hours is payment of the amount the workplace delegate would have been paid for the hours the workplace delegate would have been rostered or required to work on that day if the delegate had not been absent from work to attend the training.

(d) The workplace delegate must give the employer not less than 5 weeks' notice (unless the employer and delegate agree to a shorter period of notice) of the dates, subject matter, the daily start and finish times of the training, and the name of the training provider.

(e) If requested by the employer, the workplace delegate must provide the employer with an outline of the training content.

(f) The employer must advise the workplace delegate not less than 2 weeks from the day on which the training is scheduled to commence, whether the workplace delegate's access to paid time during normal working hours to attend the training has been approved. Such approval must not be unreasonably withheld.

(g) The workplace delegate must, within 7 days after the day on which the training ends, provide the employer with evidence that would satisfy a reasonable person of their attendance at the training.

XX.9 Exercise of entitlements under clause XX

(a) A workplace delegate's entitlements under clause XX are subject to the conditions that the workplace delegate must, when exercising those entitlements:

(i) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;

(ii) not hinder, obstruct or prevent eligible workers exercising their rights to freedom of association.

~~(b) A workplace delegate must, other than in the reasonable exercise of the entitlements under clause XX:~~

~~(i) comply with their duties and obligations as an employee; and~~

~~(ii) not hinder, obstruct or prevent the normal performance of work.~~

(b) Workplace delegates must exercise their rights in a reasonable manner. In doing so, unless it is necessary to the exercise of their rights, they must:

(i) comply with their duties and obligations as an employee; and

(ii) not hinder, obstruct or prevent the normal performance of work.

(c) Clause XX does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible workers.

(d) Clause XX does not require an eligible worker to be represented by a workplace delegate without the employee's agreement.

NOTE: Under section 350A of the Act, the employer must not:
(a) unreasonably fail or refuse to deal with a workplace delegate; or
(b) knowingly or recklessly make a false or misleading representation to a workplace delegate; or
(c) unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate under the Act or clause XX.

XX.10 Interaction with other clauses of this award

Other clauses of this award may give additional or more favourable entitlements to workplace delegates (however described). If an entitlement of a workplace delegate under another clause of this award is more favourable to the delegate than an entitlement under clause XX, the entitlement under the other clause applies instead of the entitlement under clause XX.